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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ELICEO OLAIZ BERNAL, Defendant and Appellant.	G044064 (Super. Ct. No. 08SF0010) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Thompson, Judge. Affirmed.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Eliceo Olaiz Bernal was convicted of six counts of sexual intercourse or sodomy with a child under age 10 (Pen. Code, § 288.7, subd. (a); all further statutory references are to this code unless otherwise stated) and three counts of committing a lewd act on a child under age 14 (§ 288, subd. (a)). As to the latter charges, the court found true a multiple victim enhancement. (§ 667.61, subds. (b), (c) & (e)(4).) After striking three counts of the section 288.7, subdivision (a) counts, the court sentenced defendant to 120 years to life.

Defendant appeals on several grounds. As to the convictions for having sex with a child under 10 he argues they violated ex post facto protections. In addition he asserts they were not supported by sufficient evidence that they occurred after the current statute's effective date and the instructions did not require the jury to make such a finding. He further maintains an expert witness was erroneously allowed to testify that the absence of physical symptoms did not confirm or controvert sexual abuse and that his counsel was ineffective because she failed to move to strike certain testimony. Finally, he claims cumulative error.

Although there was an erroneous jury instruction, the error was harmless. There being no other error, we affirm.

FACTS

Defendant lived with T.R., their child, E., and T.R.'s three other children, including L.V. E. and L.V. shared a bedroom with defendant and T.R. When T.R. went to work in the morning defendant remained at home to help L.V. rise and get ready for school.

Beginning in September 2006, when L.V. was in the second grade, defendant began molesting her on almost a daily basis until December 31, 2007, generally performing the same acts. Once T.R. left, defendant locked the bedroom door,

put L.V. in his bed, and covered her head with a blanket. He removed her pajama bottoms and underwear and his own pants as well. He touched the area around her vagina and used cream on her buttocks. He inserted his penis in both her vagina and buttocks and while it was inside warm liquid came out of it. Then defendant would wipe himself and L.V. with a green-striped white towel.

Defendant's acts hurt L.V. and when she cried he covered her mouth with his hand or a rag. Although she told him to stop he refused. Defendant admonished L.V. not to reveal what he was doing, telling her no one would believe her. He also threatened that if anyone learned of it, L.V.'s mother would go to jail. He sometimes gave money to her.

L.V. and her cousin, E.C., went to school together and sometimes E.C. would spend the night with L.V. When T.R. was gone and E.C. was there defendant performed the same acts with her, taking her to his bed, and removing her pants and underwear along with his own. He put his penis in her vagina, and in her buttocks where she felt him ejaculate. He used a green-striped white towel to wipe himself off. In addition, he made E.C. touch his penis. On one occasion L.V. unsuccessfully tried to stop defendant from having intercourse with E.C.; defendant grabbed her and had sex with her too. Defendant paid no attention to E.C.'s requests for him to stop but warned her not to tell and gave her money as well. These acts took place during the time E.C. was in the second and third grades, beginning September 5, 2006 until December 27, 2007, just a few days before defendant was arrested.

L.V. and E.C.'s cousin, L.C., was a grade ahead of them in school. On a few occasions while L.C. was visiting L.V. defendant would have sex with her as well. Sometimes he put his hands inside her pants and then put his fingers in her vagina. As with the other two girls, he also took L.C. to his bedroom, closed the door, and removed his pants as well as hers. He inserted his penis in her vagina and she felt him ejaculate. He used a towel to wipe himself. He did not acquiesce to her requests that he stop. The

last time he had sex with her was during the summer of 2007, after L.C. had finished third grade.

In late December 2007 L.V. told her mother what defendant had been doing. T.R. found the jar of cream and saw it was half empty although she and defendant rarely used it. T.R. then contacted police. They searched the home and discovered the green-striped towels in defendant's bedroom. They also found children's underwear that revealed the presence of semen when fluoresced. Testing showed defendant's and L.V.'s DNA on the underwear.

DISCUSSION

1. Molestation Convictions

a. Introduction

Effective September 20, 2006, section 288.7, subdivision (a) imposed a punishment of 25 years to life for an adult's rape or sodomy of a child under age 10. (Stats. 2006, ch. 337, § 26.) Defendant was charged with six counts of intercourse or sodomy with a child under the age of 10, two for each of the three victims, during the period between September 20, 2006 and December 31, 2007. One count for each of the victims was alleged to be the first time and one for each was alleged to be the last time. Contrary to the more specific information given in the Child Abuse Services Team (CAST) interviews as recited above, at trial the three victims testified only generally about the incidents. L.V. stated defendant performed the acts more than 10 times but did not remember the dates. E.C. testified defendant raped her over 10 times but was unable to recall the first time he did so. L.C. also did not remember the first time but testified the acts occurred when she was in the third and fourth grades.

In closing argument, in referring to the six counts of sodomy or intercourse with a child, the prosecutor told the jury, "you have two counts per child, and that's

basically to encompass, okay, there was a time period. They're like bookends. So you can say to yourself, 'You know what? I believe this specific first time happened' or 'I believe this specific last time happened.' But if you're talking about one specific incident you all have to agree unanimously that the specific incident happened. Or you can say, 'I believe the testimony of the girls that it happened way more than two times, and we unanimously agree to that, and we find it that way.' You can choose either method. But there are two counts per girl for the time period. That's Penal Code section 288.7(a) . . . ."

Overruling defendant's objection, the court instructed the jury with CALCRIM No. 207: "It is alleged that the crimes charged in this case occurred on or about and between September 20, 2006 and December 31, 2007. The People are not required to prove that the crimes took place exactly on or between those dates but only that they happened reasonably close to those dates."

The jury was also instructed as to unanimity with CALCRIM No. 3501: "The defendant is charged with sexual intercourse or sodomy with a child 10 or under in Counts 1-6 sometime during the period of September 20, 2006 to December 31, 2007. [¶] The People have presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless: [¶] 1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed for each offense; [¶] OR [¶] 2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period and have proved that the defendant committed at least the number of offenses charged."

The jury returned guilty verdicts on all six counts of having intercourse or committing sodomy with a child under 14, in addition to the other charges. Defendant filed a motion to dismiss those six convictions, claiming they violated ex post facto laws because the victims gave generic evidence and there was no way to tell on what incidents

the convictions were based. The jury was instructed it did not have to decide the exact dates the acts occurred but only that they be "reasonably close" to the beginning and ending dates alleged. In convicting, the jury could have been relying on acts prior to September 20, 2006, the date section 288.7 became effective.

The court granted the motion as to the three "'first time'" counts (1, 3, 5). It ruled there was insufficient evidence that the conduct on which the convictions were based occurred on or after September 20, 2006. But it denied the motion as to the three counts alleging the "'last time'" (2, 4, 6), finding there was substantial evidence showing the acts were committed after the effective date of the statute. The court sentenced defendant to three consecutive terms of 25 years to life for those counts.

b. Ex Post Facto, Substantial Evidence, and Jury Instruction

Both the federal and state constitutions prohibit ex post facto laws. (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.) That means the court may not impose greater punishment than could have been imposed at the time a crime was committed. (*Collins v. Youngblood* (1990) 497 U.S. 37, 42-43 [110 S.Ct. 2715, 111 L.Ed.2d 30]; *People v. Grant* (1999) 20 Cal.4th 150, 156-157.) Thus, for defendant to be sentenced under section 288.7, subdivision (a), the jury had to find the acts were committed after September 20, 2006. Contrary to the Attorney General's argument, the mere fact the information charged defendant with committing the crimes after that date is not sufficient.

The parties did not cite nor have we found any case directly on point. Defendant relies heavily on *People v. Hiscox* (2006) 136 Cal.App.4th 253. There, the defendant was convicted of 11 counts of committing lewd acts with a child with findings there were multiple victims and they involved substantial sexual conduct. He was sentenced to 11 consecutive terms of 15 years to life under section 667.61, which had become effective on November 30, 1994 and substantially increased the sentence for this

crime. The victims' testimony about the molestation was "'generic'" (*id*. at p. 256), without stating any dates the molestation occurred except for a period between 1992 and 1996. The jury was instructed the defendant had been charged with committing the acts between those dates and that to convict it had to find the acts occurred during that period.

The appellate court found that, because the prosecution did not prove that the crimes were committed after the effective date of section 667.61, the prohibition against ex post facto laws precluded sentencing the defendant under that statute and he had to be sentenced under the former law. (*People v. Hiscox*, *supra*, 136 Cal.App.4th at pp. 256, 257, 259.) "Since the jury was not asked to make findings on the time frame within which the offenses were committed, the verdicts cannot be deemed sufficient to establish the date of the offenses unless the evidence leaves no reasonable doubt that the underlying charges pertained to events occurring on or after [the section's effective date.] [Citation.] It would be inappropriate for us to review the record and select among acts that occurred before and after that date, or to infer that certain acts probably occurred after that date." (*Id*. at p. 261.)

Defendant here argues the three convictions that were not dismissed should have been because there is reasonable doubt the acts were committed after the effective date of section 288.7. He highlights the generic trial testimony of the three victims, i.e., their statements only that the conduct took place more than 10 times but without stating specific dates. While acknowledging that the information relayed in CAST interviews was much more specific, defendant points to the instruction that told jurors they had to find only that the acts "happened reasonably close" to the dates set out in the information. He claims this allowed the jury to convict defendant for acts before the effective date of the statute, casting reasonable doubt upon the verdicts. While conceding the instruction was erroneous, the Attorney General contends it was harmless beyond a reasonable doubt. This is the better argument.

We agree the evidence from the CAST interviews was much more specific than that in *Hiscox* and was substantial evidence that the acts were committed after the effective date of section 288.7. Moreover, in *Hiscox*, the defendant was charged with and tried for conduct committed before the effective date of the statute in question. That is not the case here where the conduct charged all occurred after section 288.7 went into effect. The problem in our case is one jury instruction.

In reviewing a claim of instructional error we must look at the entirety of the instructions and not just the one the parties agree was incorrect. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.) "The meaning of instructions is . . . determined under a . . . test of whether there is a 'reasonable likelihood' that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel. [Citations.]" (*Ibid*.) We must "'"assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

As noted above, CALCRIM No. 207 told the jury it could convict based on acts "reasonably close" to the beginning and ending dates of the conduct charged in the information. Although the beginning date of the charged conduct coincided with section 288.7's effective date, defendant argues the "reasonably close" language was problematic because it theoretically allowed the jury to rely on acts that occurred prior to the statute's effective date for all six counts since the testimony stated a few of the acts occurred before September 20, 2006.

He further maintains the prosecution's closing argument exacerbated this error. It did not tell the jurors they had to find defendant's actions were committed after the effective date of the statute. It allowed the jury to decide that defendant engaged in the conduct "way more than two times" but without specifying any dates. But the

prosecutor also alluded to "a time period," describing the charges as "bookends," and informed the jurors they could find acts happened "this specific first time" and "this specific last time."

In addition to CALCRIM No. 207, the court gave CALCRIM No. 3501, which states: "The defendant is charged with sexual intercourse or sodomy with a child 10 or under in Counts 1-6 sometime during the period of September 20, 2006 to December 31, 2007. [¶] The People have presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless: [¶] 1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed for each offense; [¶] OR [¶] 2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period and have proved that the defendant committed at least the number of offenses charged."

Defendant argues that the jurors could have convicted if they all agreed the prosecution had proven defendant committed the last act prior to September 20, 2006, as long as it was "reasonably close" to that date. But CALCRIM No. 3501 specifically set out the dates of the conduct for which defendant was charged and between which the jury had to find the conduct occurred. The beginning date was September 20, 2006, the effective date of section 288.7. Thus, CALCRIM No. 3501 limited the jury to considering acts defendant committed between the dates charged, all following the statute's effective date. In light of the dates set out in the information and CALCRIM No. 3501, we presume the jury understood it had to find the criminal acts occurred after September 20, 2006. Reviewing the instructions as a whole, in light of all the evidence and the prosecution's argument, CALCRIM No. 207 was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

2. Expert Testimony

Nurse practitioner Jennifer Yates, part of CAST, examined all three of the victims. They each told her they had sex with defendant many times, vaginally or anally. The genital and anal area of each girl appeared "normal." Over defendant's objection Yates testified about studies showing "[a] normal exam doesn't mean that nothing happened." As to the victims, she testified their normal exams could not "confirm []or negate abuse."

Defendant argues the court erred in allowing Yates to testify that the normal exams did not prove a lack of molestation because it was irrelevant and improperly vouched for the victims' veracity. He contends that, in the context of this claim, the sole issue the jury had to decide was if defendant actually committed the acts, not whether there was actual penetration. Yates's testimony, he asserts, did not address this question.

But defendant, who testified, denied molesting the victims, explained he had also denied it to T.R., and stated he had told her to have a doctor examine the victims to verify that. Yates's testimony was highly relevant to dispute his claims, whether or not penetration was in issue. That the prosecution did not argue this as part of its offer of proof does not make the evidence irrelevant.

Nor did Evidence Code section 352 bar admission of the testimony. Defendant explains his defense was to damage the victims' credibility. He claims Yates's testimony impermissibly bolstered the victims' testimony.

Evidence should be excluded under Evidence Code section 352 only where its prejudicial effect outweighs its probative value. "'Evidence is substantially more prejudicial than probative [citation] if . . . it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citation].' [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 49.) While the testimony might have been damaging to defendant, it was not unfair to admit it, even though defendant produced evidence

showing he did not abuse the victims. We review admission of the evidence under an abuse of discretion standard and reverse only if the court acted arbitrarily, capriciously, or in an absurd manner, not the case here. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

3. Ineffective Assistance of Counsel

Investigator Jeff Brown of the Orange County Sheriff's Department spoke to L.V. and E.C., and T.R., early in the process and set up the CAST interviews. He also had defendant arrested.

Brown testified that the purpose of the initial interview "was to just get the real brief basics and evaluate whether or not a crime had occurred . . ."; a more thorough CAST interview is conducted later. During cross-examination Brown agreed with defendant's lawyer when he asked, "I'm just a little bit troubled by you saying that the purpose of talking to the girls and mom is just to get the basics because you arrested [defendant] based on what you were told; right?" The lawyer continued, "So the law requires you to have more than just the basics; right?" And Brown responded, "I believed her." Counsel pressed him, asking again whether he needed to "have more than just the basics" but needed "some details." Brown replied that he had to have "probable cause to believe a felony has been committed, and [he] believed that to be the case." When the lawyer asked, "When you say you believed her, who was it that you believed," Brown said L.V.

Defendant argues his lawyer should have objected to and moved to strike Brown's testimony that he believed L.V. because it was irrelevant and vouched for L.V.'s credibility. By failing to do so, he claims, counsel rendered ineffective assistance. We are not persuaded.

To prevail on an ineffective assistance claim, defendant bears the burden of establishing both deficient performance and prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674].) He must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional standards and that there is a reasonable probability that, """"but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.""" [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

Defendant maintains that, "in hindsight," his lawyer's failure to move to strike Brown's testimony was deficient. But we do not analyze counsel's performance through that lens. """"Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" [Citation.] "[W]e accord great deference to counsel's tactical decisions" [citation], and we have explained that "courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight" [citation]. "Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts." [Citation.]' [Citation.]" (*People v. Hinton* (2006) 37 Cal.4th 839, 876.)

But we need not determine whether defense counsel did not measure up to the objective standard of performance. Where an ineffective assistance claim can be resolved solely on lack of prejudice, it is unnecessary to determine whether counsel's performance was objectively deficient. (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008.) Here, defendant has not proven it is reasonably probable there would have been a different outcome of the trial.

The three victims' testimony was consistent and each of the three corroborated the testimony of the other two. L.V.'s testimony, especially, was powerful, given that she stated defendant performed these acts virtually every day for over a year. Police found a pair of underwear in defendant's bedroom that contained a mixture of his and L.V.'s DNA. Police also found the green-stripped towels described by L.V. and E.C.

Defendant points to contradictory, exculpating evidence. He worked two jobs and would not have had the time to commit these acts. The three victims went to the same school, saw each other frequently, and had talked to each other about the abuse. Further, L.V. told the CAST interviewer that she was relying on E.C.'s memory of when the abuse began.

Defendant put on evidence that approximately six months before the abuse began, E.C. lived with her grandmother who provided child care. E.C. told a social worker she had seen her grandmother hit one child with a belt and another with a stick; the grandmother also used bad language. The Orange County Social Services Agency investigation of the grandmother for neglect found the allegation "inconclusive." Defendant claims this impaired E.C.'s credibility.

Defendant also elicited evidence the DNA on the underwear could have been deposited in a laundry cycle. The prosecution, however, rebutted it with strong evidence that 30,000 sperm cells were found in the crotch of the underwear and that it was not reasonable to believe it had been transferred in the laundry.

In light of the substantial evidence supporting a finding of abuse and Brown's brief comment, the evidence on which defendant relies is not particularly strong and neither alone nor together sufficient to show a different outcome was reasonably probable.

4. Cumulative Error

Since we find no error for which we are reversing, this claim fails.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.